UNITED STATES
v.
FLORENCE J. MATTOX

IBLA 78-211 Decided July 31, 1978

Appeal from the decision of Administrative Law Judge Michael L. Morehouse declaring the Cool Springs Nos. 1 and 2 lode mining claims null and void. Contest No. M 36607 (SD).

Affirmed.

1. Mining Claims: Discovery: Generally

Discovery of a valuable mineral deposit has been made where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine.

2. Administrative Procedure: Burden of Proof -- Mining Claims: Contests -- Mining Claims: Discovery: Generally

When the Government contests a mining claim on a charge of lack of discovery, of a valuable mineral deposit, it has assumed the burden of going forward with sufficient evidence to establish a prima facie case; the burden then shifts to the claimant to show by a preponderance of the evidence that a discovery has been made.

3. Administrative Procedure: Burden of Proof -- Mining Claims: Discovery: Generally

Where a Government mineral examiner testifies that he has examined a claim and found the mineral values insufficient to support a finding of discovery, a prima facie case of validity has been established. Government

mineral examiners are not required to perform discovery work for claimants or to explore beyond a claimants' workings.

4. Mining Claims: Hearings -- Rules of Practice: Evidence -- Rules of Practice: Hearings

Evidentiary submissions on appeal can be considered only for the limited purpose of determining whether a further hearing should be granted. The record established at the hearing in a mining claim contest is the sole basis for determining the validity of a claim.

5. Mining Claims: Hearings -- Rules of Practice: Evidence -- Rules of Practice: Hearings

There is not a sufficient equitable basis for reopening a hearing in a mining contest because of an alleged fire to the contestee's home 3 days before the scheduled hearing where neither she nor her attorney who had entered an appearance in the case requested a postponement of the hearing or a continuation of the hearing after it had been held. Also, a further hearing will not be ordered merely to afford a claimant an additional opportunity to explore and make a discovery of a valuable mineral deposit.

APPEARANCES: Florence J. Mattox, pro se; Charles B. Lennahan, Office of the General Counsel, U.S.D.A., Denver, Colorado, for the Forest Service.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

Florence J. Mattox appeals from the December 30, 1977, decision of Administrative Law Judge Morehouse declaring her Cool Springs Nos. 1 and 2 mining claims null and void. The claims are located in the Black Hills National Forest within the NW 1/4 SW 1/4, T. 2 S., R. 4 E., Black Hills meridian, Custer County, South Dakota. At the instigation of the U.S. Forest Service, the claims were contested. The complaint charged that they were invalid for lack of discovery of a valuable mineral deposit.

At the hearing, August 17, 1977, the Forest Service mineral examiner testified that he had inspected the claims on three occasions and had taken samples from the diggings which showed, after assay, unquantifiably small amounts of mineralization of gold, silver,

lead, zinc and copper. He then testified that he did not feel that a prudent person would be justified in further expenditure of time, money and effort in the hope of developing a valuable mine. On the basis of the evidence presented at the hearing, Judge Morehouse found the claims invalid for lack of valuable mineral discovery.

Appellant was not represented at the hearing. On appeal she asserts that a fire at her home August 14, 1977, prevented her from personally showing the claims to the mineral examiner on August 16 and from appearing at the hearing the following day. Further, she alleges there is gold and platinum in the claim and has submitted a drawing of her workings where minerals were allegedly found and where she would like to continue to work. She indicates an analysis of a specimen in the record proves her statement. However, the only assay report in the record is the Government's assay showing just a trace of minerals.

[1] Discovery of a valuable mineral deposit within the boundaries of each claim is essential to the claim's validity. 30 U.S.C. § 23 (1970); United States v. Zweifel, 508 F.2d 1150, 1154 (10th Cir. 1975); cert. denied, sub nom. Roberts v. United States, 423 U.S. 829 (1975). A discovery of a valuable mineral deposit has been made where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. Castle v. Womble, 19 L.D. 455, 457 (1894); approved in Chrisman v. Miller, 197 U.S. 313, 322 (1905). Evidence may be required that the deposit of minerals could be mined, removed and marketed at a profit. United States v. Coleman, 390 U.S. 599 (1968).

[2] When the Government contests a mining claim on a charge of lack of discovery of a valuable mineral deposit, it has assumed the burden of going forward with sufficient evidence to establish a prima facie case; the burden then shifts to the claimant to show by a preponderance of the evidence that a discovery has been made. United States v. Becker, 33 IBLA 301 (1978); United States v. Springer, 491 F.2d 239 (9th Cir. 1974), cert. denied, 419 U.S. 834 (1974); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959).

[3] Where a Government mineral examiner testifies that he has examined a claim and found the mineral values insufficient to support a finding of discovery, a prima facie case of invalidity has been established. Government mineral examiners are not required to perform discovery work for claimants or to explore beyond a claimant's workings. United States v. Bechthold, 25 IBLA 77 (1976); United States v. Blomquist, 7 IBLA 351 (1972).

The record indicates that the Government established its prima facie case. Appellant did not present evidence to controvert the

Government's case at the hearing. Therefore, the Government's case stands.

[4,5] The determinative issue on appeal is whether appellant has shown a sufficient reason for further evidentiary proceedings in this case. In addition to asserting generally that there are minerals on the claim which can be pointed out to a mineral examiner, appellant is requesting an opportunity to do further work to prove her case. To the extent appellant's assertions of mineralization and her drawings are evidentiary, they can be considered only for the limited purpose of determining whether a further hearing should be granted. The record established at the hearing in a mining contest is the sole basis for determining the validity of a claim. Any additional evidence tendered on appeal can be considered only to determine if a further hearing is warranted. United States v. Crismon, 34 IBLA 381 (1978); United States v. Taylor, 25 IBLA 21, 25 (1976). Generally, to warrant a further hearing, an appellant must show a sufficient equitable basis for holding a hearing and make an evidentiary tender of proof of discovery to be presented at such a further hearing. United States v. Crismon, supra.

This case is akin to those cases where a contestee appeared at a hearing but failed to produce sufficient evidence to overcome the Government's prima facie case. The only possible difference is appellant's assertion that she failed to be at the hearing because of the fire at her home 3 days before. The difficulty with this excuse is that the record does not show any communication of this reason for her absence to the Administrative Law Judge. She made no request for a postponement of the hearing, or a continuation of the hearing after it had been held, or took any other action until this appeal was filed following her receipt of the Judge's decision. The record discloses that although appellant is not represented by an attorney on appeal, she was represented by an attorney during the prehearing procedures. He entered his appearance in the case and filed an answer to the complaint in her behalf. The notice of hearing and the Judge's decision were served on him. There is no notice in the record of any withdrawal of appearance in the case. As appellant was represented by counsel and as neither she nor he took any timely action to stay the hearing, it was proper for the Judge to proceed with the hearing and render his decision based on the evidence of record then. In view of the above, equitable justification for reopening the hearing proceeding has not been established.

Furthermore, we see no other discretionary basis for ordering a further hearing in this case. Appellant's vague assertions concern possible mineralization within the claims. As indicated, the assay report to which she must be referring shows only a trace of minerals. We do not have sufficient reason to conclude that a further hearing might be productive of evidence which might compel a different conclusion. In the absence of such reason, we see no reason to order a

further hearing. United States v. Johnson, 33 IBLA 121 (1977); H. L. Bigler, 11 IBLA 297, 301 (1973); Frank H. Steffre, 3 IBLA 255, 259 (1971). A further hearing will not be ordered merely to afford a claimant a further opportunity to explore and make a discovery of a valuable mineral deposit. United States v. Crismon, supra.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Administrative Law Judge Morehouse declaring Cool Springs Nos. 1 and 2 mining claims null and void is affirmed.

Joan B. Thompson
Administrative Judge

I concur:

Douglas E. Henriques
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI CONCURRING SPECIALLY:

While I agree with the result reached in the majority opinion as well as with its conclusion that appellant has not shown a sufficient equitable basis upon which this Board could predicate the ordering of a new hearing, I wish to record my disagreement with the two-step test which the majority indicates an appellant must meet before another hearing will be ordered. The majority opinion establishes a bifurcated approach in which appellant must first show "an equitable basis" upon which a motion for a new hearing can be grounded, and then submit an evidential tender of proof of discovery of a valuable mineral deposit. For my part, where, as here, the initial participation of an appellant is involved, as opposed to granting of the opportunity to an appellant to participate in another hearing, the only showing required is that the failure to appear which necessitates the ordering of a new hearing is the result of such extraordinary circumstances that the dictates of justice requires such appellate action.

In the instant case the majority apparently feels that even had such a showing been made, the request for a new hearing would be denied on the ground that the appellant has not tendered any evidence sufficient to raise a legitimate doubt as to the correctness of the Judge's findings on discovery. I do not believe that in situations where it has been affirmatively found that circumstances are extant in a degree sufficient to establish an equitable basis for the granting of a new hearing, it is properly within the province of the Board to weigh any proffered evidence. Such a practice must inevitably result in the Board being the initial trier of fact in derogation of its appellate role. To my mind, the factors to which the majority adverts relate to those situations in which appellants seek an additional hearing in which to tender new evidence or, alternatively, seek the grant of a hearing to which they have no cognizable right. In such a situation I have no difficulty with the approach envisaged by the majority. In the mining claim contest situation, however, the Department has held since United States v. O'Leary, 63 I.D. 341 (1956), that proper notice and an adequate hearing are prerequisites to a finding of invalidity where the determination thereof is premised on the resolution of disputed factual questions. Where this Board determines that an "adequate" hearing has not been held owing to reasons for which an appellant cannot be held culpable, I think the appellant has a right to a hearing which cannot be defeated by the Board's independent examination of proffered evidence.

This approach accords with past Board treatment of cases in which determinative issues were not clearly joined in the contest complaint or at the hearing. Thus, in United States v. McElwaine, 26 IBLA 20 (1976), even though evidence existed in the record which tended to support a finding of invalidity of a mining claim because of the existence of excess reserves, the Board remanded the case noting that there had been no charge in the contest complaint relating

to excess reserves and therefore the Board could not "assume that all the pertinent evidence on this issue is before the Board." Id. at 27. Cf. United States v. Northwest Mine and Milling, Inc., 11 IBLA 271 (1973); Harold Ladd Pierce, 3 IBLA 29 (1971).

The real danger which I envisage from the majority's approach is that the untutored appellant will not realize the necessity of establishing his or her substantive case at the same time that the individual attempts to show the equitable basis upon which the request for a hearing is premised; a hearing at which the mineral claimant would be afforded the opportunity to establish the same substantive case before an administrative law judge. I believe that any mining claimant should have a right to participate in at least one evidentiary hearing on disputed issues of fact prior to a finding of the claim's invalidity. We, of course, must be concerned that appellants and mining claimants diligently attempt to comply with the applicable regulations and procedures. But where we are convinced of the equitable basis for the grant of another initial hearing, I feel it is error to then require a tender of evidentiary proof as an additional prerequisite to the grant of the hearing.

Inasmuch as I agree, however, that appellant has not been able to show the necessary equitable basis for the relief requested, I concur in the result reached in the majority opinion.

James L. Burski
Administrative Judge